No. 76-754

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE B. F. GOODRICH COMPANY, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A), as corrected (Pet. App. B), is reported at 541 F. 2d 1178.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1976. A timely petition for clarification and rehearing, and, alternatively, for rehearing *en banc*, was denied on October 8, 1976 (Pet. App. C). The petition for a writ of certiorari was filed on December 2, 1976.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On December 13, 1976, Mr. Justice Stewart denied petitioners' application for recall and stay of mandate.

QUESTIONS PRESENTED

1. Whether, in sustaining the regulation challenged here, the court of appeals improperly relied upon information not on file in the public rule-making docket during the period for public comment.

2 Whether reasonable, fair, and reliable tire testing devices and procedures that cannot, because of technological limitations, assure perfectly identical results in every test repeated under the same conditions, are valid.

STATUTES AND REGULATION INVOLVED

Pertinent provisions of the Administrative Procedure Act, 5 U.S.C. 553, and of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, as amended, 15 U.S.C. 1381 *et seq.*, are set forth at Pet. App. E.

The Uniform Tire Quality Grading Standards regulation, 49 C.F.R. 575.104, is set forth at Pet. App. A, pp. 26-46. The preamble to the regulation, 40 Fed. Reg. 23073, is set forth at Pet. App. F.

STATEMENT

1. Section 203 of the National Traffic and Motor Vehicle Safety Act of 1966, as amended ("the Safety Act"), 80 Stat. 729, 15 U.S.C. 1423, requires the Secretary of Transportation to establish a uniform quality grading system for motor vehicle tires in order to assist consumers to make informed choices when purchasing tires.[2] The Secretary has delegated this function to the National Highway Traffic Safety Administration (NHTSA) (Pet. App. A, p. 3, n. 2). After a lengthy informal rule-making proceeding, in which a massive record was compiled,[3] NHTSA promulgated a regulation prescribing uniform tire quality grading standards (UTQGS), 49 C.F.R. 575.104 (Pet. App. A, pp. 26-49), and an accompanying statement of their basis and purpose (Pet. App. F). The regulation both requires tire manufacturers to provide information to consumers with respect to treadwear, traction, and temperature resistance, and establishes procedures and devices to test the performance of tires in those areas (Pet. App. A, pp. 14-18). Low scoring tires may continue to be sold, but the disclosure of a tire's quality grades relative to other tires may affect the price the public is willing to pay in a competitive market (Pet. App. A, p. 19).

2. On petition for review of the regulation by various tire manufacturers under 15 U.S.C. 1394(a)(1), the court of appeals in a comprehensive opinion upheld the regulation's major provisions.[4] After reviewing the massive record under the "arbitrary and capricious" standard for informal rule-making and, as a precaution, under the "substantial evidence" standard urged by the manufacturers (Pet. App. A, pp. 4-5), the court found that "all aspects of the rule which we approve were supported by substantial evidence and were not the product of arbitrary or capricious agency action" (Pet. App. A, p. 24).

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[2]See S. Rep. No. 1089, 89th Cong., 2d Sess. 6 (1966).

[3]In all, the agency issued 18 rule-making notices (1 J.A. 85-151). The certified list of documents and other materials contained in the administrative record covered 80 pages (1 J.A. 1-81), and the administrative record covered approximately 12,000 pages ("J.A." refers to the five-volume joint appendix in the court of appeals).

[4]The regulation's testing methodology was upheld in all respects. However, provisions of the regulation concerning tire labelling (Pet. App. A, p. 12) and the selection of "course monitoring tires," used to measure simultaneously with each tire test the current condition of the treadwear-testing course (Pet. App. A, pp. 19-21), were remanded to NHTSA. The agency has issued notices of rule-making involving these matters. 41 Fed. Reg. 54205 (December 13, 1976) (tire labelling); 42 Fed. Reg. 10320 (February 22, 1977) (selection of course monitoring tires).

The court, *inter alia*, rejected the manufacturers' allegations of procedural defects and abuses in the rule-making proceeding (Pet. App. A, pp. 8-10). It found that "[t]he basic data upon which the agency relied in formulating the regulation was available to petitioners for comment" (Pet. App. A, p. 10), and that "the record is full of comment by the Rubber Manufacturers Association and many individual rubber companies" (Pet. App. A, p. 8), which were "many and detailed" (Pet. App. A, p. 9).

The court also rejected the contention that the regulation's testing devices and procedures were not objective because they permitted allegedly excessive variation. It found that under existing technology "theoretical perfection" in testing procedures for millions of tires is unattainable, and generally sustained the testing devices and procedures as "reasonably fair and reasonably reliable" (Pet. App. A, pp. 18-19, 24-25).

ARGUMENT

1. Petitioners' contention that the court of appeals improperly permitted NHTSA to supplement the record in the rule-making proceeding after the period for public comment had expired, in violation of the informal rule-making requirements of 5 U.S.C. 553(c), is without substance. The court of appeals "searched this voluminous record for evidence to support petitioners' complaints of procedural abuses and * * * found none" (Pet. App. A, p. 8). The court correctly held that "[t]he Administrative Procedure Act does not require that every bit of background information used by an administrative agency be published for public comment" (Pet. App. A, p. 10). After a careful sifting of the extensive record, the court further concluded that "[t]he basic data upon which the agency relied in formulating the regulation was available to petitioners for comment" (*ibid.*). That largely factual

conclusion, derived from a complex record, does not warrant review.

a. As a factual matter, petitioners' contention (Pet. 12) that the agency used supplementary information to support the regulation and that the court of appeals relied on that information in sustaining the regulation is incorrect.

Petitioners first argue that information concerning lead time for implementing the regulation, and the capacity of the treadwear testing course, was not included in the rule-making docket during the comment period (Pet. App. 7-8). But that information had been given to petitioners at a briefing which the agency held for interested parties in July 1974 (III J.A. 744; see Res. Br. 85-86),[5] and, as petitioners have conceded (Pet. Reply Br. 48), a transcript of that briefing had been placed in the rule-making docket and was available for public comment. Moreover, throughout the last four comment periods (on rulemaking notices 12, 14, 15, and 16, I J.A. 122-137), petitioners were on notice of the proposed final regulation and had ample opportunity to comment upon all relevant aspects (Pet. App. A, pp. 9-10). Cf. *City of Chicago, Illinois* v. *Federal Power Commission*, 458 F. 2d 731, 748 (C.A.D.C.), certiorari denied, 405 U.S. 1074.

Petitioners' further contention that the record was improperly amended by a supplemental appendix filed in the court of appeals (Pet. 8) also is groundless. The parties agreed that the government could file a supplemental

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[5] "Res. Br.," "Pet. Br.," and "Pet. Reply Br." refer to the parties' briefs, and "Res. Mem." refers to the government's reply memorandum (a copy of which is being lodged with the Clerk of this Court), in the court of appeals; "Supp. App." refers to respondents' supplemental appendix in that court.

appendix.[6] All of the documents it contained were properly before the court of appeals for the limited purposes for which they were cited. Petitioners contend that 15 items were cited "to explain away critical deficiencies in this regulation" (Pet. 9, 10) or to provide the reviewing court with a record basis for its decision. But those materials were submitted not as substantial evidence in support of the regulation but in response to specific arguments or to allegations of misconduct advanced in petitioners' affidavits and brief.[7]

Petitioners claim that the court of appeals "expressly relied upon the affidavits of agency personnel filed with the reviewing court in affirming the lead-time provisions of the Regulation" (Pet. 12, n. 5). But those affidavits (Supp. App. 43, 68, 83, 89, 110, and 116), which originally had been filed in response to petitioners' motion for a stay, which itself had been accompanied by extensive affidavits (totalling 272 pages) cited in petitioners' brief (Pet. Br. 7, 66, 70, 73), merely summarized and illustrated the government's contentions. The court of appeals simply set forth those contentions and then held that "[t]here is 'ample evidence' *in the record* to support these conclusions" (Pet. App. A, p. 24; emphasis added). Thus the court's decision was based ultimately upon the administrative record.

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[6]The government's supplemental appendix was filed pursuant to an agreement with petitioners' counsel because the five-volume joint appendix (which itself contained only selected excerpts from the 12,000-page administrative record) was prepared contemporaneously with petitioners' brief. The government therefore did not know what additional documents it might need to cite until it was served with that brief; the supplemental appendix simply provided further relevant documentation that had been omitted from the joint appendix. Indeed, petitioners themselves filed with their reply brief a 34-page supplemental appendix containing documents that were not included in the joint appendix or even in the certified administrative record.

[7]Each item was brought to the court's attention in an appropriate manner. The American Society for Testing and Materials' (ASTM) Method E275-70 (Supp. App. 21) was specified in every relevant rule-making notice since February 28, 1973, when the traction test was first proposed as part of UTQGS, and in the final rule (1 J.A. 92, 94, 99, 100, 104, 105, 107, 110, 118, 123, 126, 141, 144); thus, petitioners had many opportunities to submit timely comments regarding that test. Excerpts from standard statistical textbooks (Supp. App. 30, 36 and 41) were cited in the government's brief as examples of "[A]ny authoritative publication on statistics" (Res. Br. 55). Petitioners, too, cited a standard statistical text (Pet. Br. 22, 29). Three items (Supp. App. 104, 105, 107) were cited in the government's brief not as substantial supporting evidence but solely to refute petitioners' allegation of official misconduct in allegedly abandoning a testing methodology—the "control tire approach"; see Pet. App. A, p. 9; Res. Br. 10; Res. Mem. 12).

The minutes of an ASTM Subcommittee (Supp. App. 39) were offered to show that data that petitioners had relied upon (Pet. Br. 22) did not pertain to the ASTM standard tire which is specified in the regulation for traction testing, but rather to a different tire which the ASTM had earlier rejected as its standard tire; representatives of petitioners were present at the Subcommittee meeting and received copies of the minutes (Supp. App. 39).

An article in a standard industry publication (Res. Mem. 32 and Res. Mem. App. 11) was offered to refute any "claim that the agency has no expertise" in a certain technical area (Res. Mem. 32, n. *).

Petitioners also assert (Pet. 12, n. 5) that the court of appeals relied upon an "Inflation Impact Review" that was docketed by the agency the day the regulation was issued, and amended after the review proceedings were filed. This statement reflected the agency's determination that an Inflation Impact Statement was not required under Executive Order 11821, 39 Fed. Reg. 41501. The court of appeals referred to it in connection with "petitioner's protests about the cost of the tire labels [*i.e.*, of paper labels carrying tire grading information]" (Pet. App. A, p. 14). The court treated the document as an explication, not as record evidence, for it ruled that "it seems obvious to us, as it does

to the agency, that full information * * * can be cheaply provided to the ultimate consumer * * *" (*ibid.*).[8]

b. Petitioners' argument that the court of appeals' decision permits agencies to justify regulations on the basis of information not available for public comment misreads both the court's decision and the informal rule-making requirements of the Administrative Procedure Act. The court of appeals correctly recognized that the agency was engaged in informal rule-making, which does not require that rules "be made on the record after opportunity for an agency hearing * * *." 5 U.S.C. 553. See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-758 (Pet. App. A, pp. 4-5). No more was required in this case than that there be notice of the proposed rule-making, that interested persons have an opportunity to comment and "that after consideration *of the record so made* the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." *United States* v. *Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 758 (emphasis added). The reason for incorporating public comments, as well as other pertinent factual information, in the record is to broaden the agency's consideration of relevant information, much as in a legislative hearing.[9] Informal rule-making

[8]In any event, the agency's determination pursuant to Executive Order 11821 is not independently reviewable. See *Independent Meat Packers Ass'n* v. *Butz*, 526 F. 2d 228 (C.A. 8), certiorari denied, 424 U.S. 966.

[9]Thus it is to the record of the informal rule-making proceeding, including public comments and other pertinent information, that the judicial review provision of the Safety Act (15 U.S.C. 1394(a)(1)) refers in providing that "[t]he Secretary * * * shall file in the court [of appeals] the record of the proceedings on which the Secretary based his order * * *". Nothing in Section 1394(a)(1) enlarges the record requirements for informal rule-making under the Safety Act beyond the criteria specified in *Allegheny-Ludlum*. Cf. Recommendations of the Administrative Conference of the United States, 1 C.F.R. 305. 74-4(c)(1).

thus enables the agency to engage in a quasi-legislative deliberation that focuses its accumulated expertise on a broad range of policies, choices, and interests. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202; *American Trucking Assn.* v. *United States*, 344 U.S. 298, 309-310.[10] In this process, the agency must take a hard look at "the major issues of policy pro and con raised in the submissions to the agency." *National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F. 2d 672, 692 (C.A. D.C.), certiorari denied, 415 U.S. 951. But this is a far cry from petitioner's insistence that every bit of data upon which an agency may rely in formulating a rule must be incorporated into the rule-making docket during the period for public comment: Such an approach would undermine the fundamental difference between, on the one hand, administrative adjudication or formal rule-making, and, on the other, informal rule-making, which should "not * * * be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule-making." *American Airlines, Inc.*

[10]See *Angel* v. *Butz*, 487 F. 2d 260, 262-263 (C.A. 10), certiorari denied, 417 U.S. 967; *City of Chicago, Illinois* v. *Federal Power Commission, supra*, 458 F. 2d at 747-748; *General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846, 862 (C.A. 5); *Siegel* v. *Atomic Energy Commission*, 400 F. 2d 778, 786 (C.A. D.C.); *California Citizens Band Association* v. *United States*, 375 F. 2d 43, 54 (C.A. 9), certiorari denied, 389 U.S. 844; *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197, 205 (C.A. 9), certiorari denied, 382 U.S. 958; *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F. Supp. 925, 940 (D. Del., 3-judges). See also Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 187, 189 (1974); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 Harv. L. Rev. 782, 784-785 (1974).

v. *Civil Aeronautics Board*, 359 F. 2d 624, 629, certiorari denied, 385 U.S. 843.[11]

2. Petitioners also contend that in sustaining the testing devices and procedures described in the regulations, the court of appeals failed to give effect to its own prior decision in *Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d 659, 676, and disregarded the requirement of Section 103(a) of the Safety Act that standards "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a) (Pet. 17).[12] These contentions were fully answered by the court of appeals when it held (Pet. App. A, pp. 18-19):

> * * * we have approached petitioners' arguments about the testing devices and procedures with full realization that no measuring devices yet made by man are perfect. The fact that moisture and heat affect the accuracy of the household yardstick would help make it useless in a die shop. But these minor variations are hardly grounds for eliminating this generally reliable

[11] *Portland Cement Association* v. *Ruckelshaus*, 486 F. 2d 375 (C.A. D.C.), certiorari denied, 417 U.S. 921, upon which petitioners rely (Pet. 7, 9, 13), is consistent both with these general principles governing informal rule-making and with the decision of the court of appeals in this case. *Portland Cement* involved test data, basic to the validity of a regulation, that were not available for comment by those directly concerned. In contrast, the court in this case found that "[t]he basic data upon which the agency relied in formulating the regulation was available to petitioners for comment" (Pet. App. A, p. 10).

[12] While the criteria set forth in Section 103(a) are satisfied by the UTQGS regulation, the agency also contended below that the regulation is not required to meet those criteria because it was issued under Sections 112(d) and 119 of the Safety Act, 15 U.S.C. 1401(d) and 1407, as a Consumer Information Regulation rather than under Section 103 as a Federal Motor Vehicle Safety Standard (Res. Br., pp. 2-7, 24-28; Res. Mem., pp. 1-9). The court below found it unnecessary to decide this question (Pet. App. A, p. 7.)

> tool from normal household use. We recognize that every reasonable effort should be made by the agency to assure the accuracy of the grades assigned to tires under the three selected standards. But clearly no test procedures designed to grade millions of tires are going to approach perfection.
>
> Section 203 of the Act conveys no governmental power to ban the sale of any tire no matter how low it scores on the tests ultimately employed. The primary impact of this regulation upon the industry will undoubtedly be that the lower the tire grade, the lower the price the public is likely to pay for it in a competive market. This situation calls for reasonably fair and reasonably reliable grading procedures, not theoretical perfection.[13]

[13] This holding is not in any way inconsistent with the court of appeals' earlier ruling in *Chrysler Corp.* v. *Department of Transportation, supra*. On the contrary, as another court of appeals has held, citing *Chrysler*, "objective" tests are those which can be measured "within reasonable accuracy". *Portland Cement Association* v. *Ruckelshaus, supra*, 486 F. 2d at 401, n. 103.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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